IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO. 2 OF 1999

Popat Bandu Waghmare ....Appellant.
(Orig.Accd.No.4)

Versus

The State of Maharashtra ....Respondent.

Mr.Hakim Salim A.R. Adv. For the appellant.

Mrs.P.H.Kantharia, APP for the State.

CORAM: V.G. PALSHIKAR
AND
ANOOP V. MOHTA, JJ.

14.9.2004.

ORAL JUDGMENT: (Per Palshikar, J.)

Being aggrieved by the judgment and order passed by Additional Sessions Judge, Greater Bombay on 14.10.1998 the appellant has preferred this appeal on the grounds mentioned in the memo of appeal as also verbally canvassed before us.

2. With the assistance of learned counsel and the learned Assistant Public Prosecutor we have scrutinized and reappreciated the evidence on the record.

3. The prosecution case stated briefly is that on 12.10.1983 two eye witnesses saw four accused persons chasing the victim and hitting him with a rod and stone as a

result of which the victim died. On investigation the present four accused persons were prosecuted for committing murder of the deceased. The prosecution examined in all five witnesses two of whom claim to be eye witnesses.

4. At the time when the matter was taken up for adjudication by the learned Sessions Judge a submission was made on behalf of the prosecution that there was no case against accused Nos.1 to 3 and the matter is therefore no pressed against them. It was pressed only against accused No.4 and the learned trial Judge accepting the evidence of P.Ws. 1 and 2 who claim to be the eye witnesses convicted the appellant as aforesaid. It is this order which is challenged in this appeal on the grounds mentioned in the memo of appeal. It is pertinent to note that the accused however was granted bail by this Court on 7.12.1999 and he was ordered to be released on bail in the sum of Rs.15,000/- with two sureties in the like amount. The accused was unable to raise sureties with the result he continued to be in jail inspite of bail.

5. Criminal Application No.3718 of 2004 was therefore requesting for grant of bail with reduced amount of security and sureties. Taking into consideration that the matter was tried in 1985 almost 19 years ago and the accused is in jail since order of conviction in 1998 we heard the appeal on the basis of the judgment and evidence which we scrutinized with the assistance of the learned counsel as aforesaid.

6. P.W.1 -Bhimabai alleged that around 10.00 a.m. on 12.10.1983 there was a quarrel between Kisan the deceased and the accused persons and the accused persons

around 12.40 p.m. on the same day, she noticed, Kisan running away towards RCF quarters and Popat, Arjun, Kachru and Yakub were following him. She deposed that they were chasing him and Popat the present appellant was having an iron bar in his hand, Arjun and Kachru were carrying stones in their hands. She stated that mother of Kisan was also there and both of them started running after the accused persons. She claimed that she noticed Popat assaulting the victim with rod and Arjun and Kachru were assaulting Kisan with stones. The matter was then reported to the police. Police came on the scene, took injured to the hospital where he was pronounced dead and the accused were charge sheeted under section 302 read with section 34 of IPC. The prosecution has examined five witnesses to prove its case where statement was made on behalf of the prosecution that it does not press the case against accused Nos.1 to 3. The learned Judge has accepted the statement of the prosecution that though there are two eye witnesses and both of them named all the four persons there is no evidence acceptable in so far as other accused persons are concerned. He does not point out why it is acceptable only in relation to accused No.4. Apart from that we have scrutinized the evidence on record. The judgment discloses that P.W.1 was required to go near the dock in the Court room to identify accused person and yet we are asked to believe her statement that she could see and identify all the four accused persons 50 feet away in a running condition and state that the rod in the hand of accused No.4-Popat was an iron rod and not a stick. Even in the matter of victim other witness is unable to state with any certainty as to how exactly accused persons assaulted the victim. It is further pertinent to note that both eye witnesses specifically named Arjun and Popat as the assailants yet Arjun is acquitted and Popat is convicted.

7. In our view such an order is obviously erroneous and illegal. When same set of circumstances are rejected in relation to three other accused persons acceptance of such doubtful testimony in relation to one by a witness who was not even able to identify the accused in the Court room is impermissible in law and in any case risky proposition. In our opinion, the evidence was hopelessly inadequate to convict any of the persons involved or allegedly involved in the crime. The injuries as explained by the doctor are consistent with the attack by stick also. Yet another important aspect which has been ignored by the learned trial Judge is the fact that so called iron rod has not been seized by the police. There is therefore nothing before the Court to come to the conclusion that it was an injury caused by an iron rod only and not by heavy stick. In such circumstances acquitting the three accused persons and convicting only present appellant was an error of law. In the result, therefore, appeal succeeds and is allowed. Accused is liable to be released forthwith if not required for any other purpose.